

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

WP

To be argued by
LOUIS R. ROSENTHAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-2091

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WIDELTO LEYVA,

Petitioner-Appellant

-against-

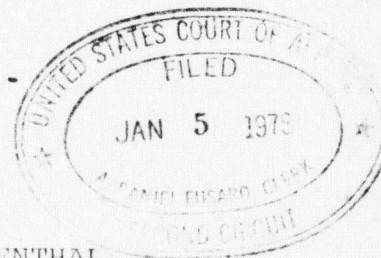
SUPERINTENDENT, GREENHAVEN
CORRECTIONAL FACILITY,

Respondent-Appellee

On Appeal From An Order of the United
States District Court for the Eastern
District of New York

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SUPPLEMENTAL BRIEF FOR PETITIONER-APPELLANT



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TABLE OF CONTENTS

	<u>PAGE #</u>
PRELIMINARY STATEMENT.....	1.
ADDITIONAL QUESTION PRESENTED.....	1.
ADDITIONAL STATEMENT OF FACTS.....	1.
<u>ARGUMENT</u>	
PETITIONER FULLY EXHAUSTED HIS STATE REMEDIES AND HIS FAILURE TO APPEAL TO THE UNITED STATES SUPREME COURT DOES NOT BAR PETITIONER'S FEDERAL HABEAS CORPUS ACTION.....	2.
CONCLUSION.....	16.

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE #</u>
<u>Adargo v. Patterson</u> , 371 F. 2d 822 (10th Cir. 1967).....	5.
<u>Darr v. Burford</u> , 339 U.S. 200 (1949).....	3.
<u>Fay v. Noia</u> , 372 U.S. 391 (1963).....	3.
<u>Hedberg v. Pitchess</u> , 362 F. 2d 511 (9th Cir. 1966).....	5.
<u>Jackson v. Maxwell</u> , 262 F. Supp. 494 (S.D. Idaho 1966).....	5.
<u>Peters v. Dillon</u> , 227 F. Supp. 487 (D.C.Colo.1964)	5.
<u>State of Tennessee, ex. rel. Ford v. Morris</u> 236 F. Supp. 780 (W.D. Tenn. 1965).....	4.
<u>U.S. ex rel Farrugia v. Bhono</u> , 256 F. Supp. 391 (S.D.N.Y. 1966).....	5.
<u>U.S. ex rel Johnson v. Warden of Rikers Island Penitentiary</u> , 240 F. Supp. 486 (S.D.N.Y. 1965).....	6.
<u>United States v. McCloskey</u> , 239 F. Supp. 419 (S.D.N.Y. 1965).....	4.
<u>U.S. ex rel. Wallen v. Warden of Greenhaven State Prison, at Stormville, New York</u> , 258 F. Supp. 1012 (S.D.N.Y. 1966).....	6.
<u>Wainwright v. Sykes</u> , _____ U.S. _____, 45 U.S.L.W. 4807 (U.S. June 23, 1977).....	10.
<u>Whippler v. Balkcom</u> , 342 F. 2d 388 (5th Cir. 1965).....	4.

FEDERAL STATUTES

28 U.S.C. 2254.....	2.
---------------------	----

NEW YORK STATUTES

N.Y. Penal Law Section 220.25 (1).....	1.
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PRELIMINARY STATEMENT

This Supplemental Brief is submitted by the petitioner-appellant Widelto Leyva with the permission of the Hon. Wilfred Feinberg, U.S.C.J., sitting as Presiding Judge of a panel of this Court on December 13, 1977, the scheduled date of argument of this appeal. Due to the fact that petitioner-appellant was submitting and the court desired oral argument, the case was taken off the calendar to be restored at a future date upon motion by the appellant. This brief is addressed solely to an issue raised in open Court by the Hon. Thomas Meskill, U.S.C.J., another member of the panel sitting December 13, 1977.

ADDITIONAL QUESTION PRESENTED

Does the failure of a state prisoner to seek review in the United States Supreme Court from the decision of the New York Court of Appeals upholding a state statute against a claim of conflict with the Federal Constitution constitute a failure to exhaust state remedies sufficient to bar habeas corpus relief?

ADDITIONAL STATEMENT OF FACTS

The only additional fact not noted in the petitioner-appellant's main brief is that following the decision by the New York Court of Appeals in People v. Leyva, 38 N.Y. 2d 160 (1975), upholding the constitutionality, of N.Y. Penal Law, Section 220.25(1), petitioner did not seek review of that decision in the United States Supreme Court.

ARGUMENT

PETITIONER FULLY EXHAUSTED HIS STATE REMEDIES AND HIS FAILURE TO APPEAL TO THE UNITED STATES SUPREME COURT DOES NOT BAR PETITIONER'S FEDERAL HABEAS CORPUS ACTION.

The petitioner exhausted all state remedies, and therefore his failure to take a direct appeal to the United States Supreme Court does not bar him from seeking federal habeas corpus relief.

The exhaustion requirements in regard to habeas corpus proceedings are formulated in 28 U.S.C. Section 2254, which states:

a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States,

b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the Courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect

the rights of the prisoner.

c) An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

This section does not speak of seeking review in the United States Supreme Court.

Nevertheless, the Supreme Court in Darr v. Burford, 339 U.S. 200, (1949) put a gloss upon the words "remedies available in the Courts of the State" to include petitioning for certiorari in the Supreme Court, which is not the Court of any state, among the remedies that an applicant must exhaust before proceeding in federal habeas corpus. The Court stated in Darr, supra, that ordinarily, an application for habeas corpus by one detained under a state court judgment of conviction for a crime will be entertained by the federal court only after state remedies available, including all appellate remedies in the state court and in the United States Supreme Court by appeal or writ of certiorari, have been exhausted.

However, this specific formulation was overruled by the Supreme Court in the case of Fay v. Noia, 372 U.S. 391, 434-435 (1963) which stated:

"...what we hold today necessarily overrules Darr v. Burford to the extent it may be thought to have barred a state prisoner from federal habeas relief

"if he had failed timely to seek certiorari in this Court from an adverse state decision."

Since the ruling in Fay, supra, Federal Courts no longer require a habeas corpus petitioner to seek United States Supreme Court review of an adverse decision rendered by the highest state court. This holds true whether the review is by writ of certiorari or by direct appeal. A state prisoner may, in an appropriate case, seek relief in the district court, by way of habeas corpus, notwithstanding that direct review in the Supreme Court is still open to him. United States v. McCloskey, 239 F. Supp. 419 (S.D.N.Y. 1965).

Under the doctrine of exhaustion as applied in federal habeas corpus proceedings, an applicant who has sought direct review of his conviction, including all constitutional issues raised in habeas corpus petition, in the highest state court, though he has sought neither certiorari in federal Supreme Court nor collateral review in state court, has exhausted state remedies. Whippler v. Balkcom, 342 F. 2d 388, (5th Cir. 1965). The requirement in federal habeas corpus proceeding that all state remedies first be exhausted is satisfied when the state convict has received an adverse adjudication as to federal rights in the highest court of the state. State of Tennessee ex rel Ford v. Morris, 236, F. Supp. 780. (W.D. Tenn. 1965). The exhaustion of state

remedies doctrine does not require a state prisoner who has exhausted all remedies available in the state of his conviction to petition the Supreme Court of the United States for certiorari before seeking relief by way of habeas corpus in the federal court. Hedberg v. Pitchess, 362 F. 2d 511 (9th Cir. 1966). It is no longer necessary to seek certiorari in the United States Supreme Court in order to exhaust state remedies for purposes of bringing habeas corpus proceedings Adargo v. Patterson, 371 F. 2d 822 (10th Cir. 1967). Petitioner's failure to apply for certiorari in the United States Supreme Court did not bar petition for habeas corpus filed in federal district court. Peters v. Dillon, 227 F. Supp. 487 (D.C. Colo., 1964), Jackson v. Maxwell, 262 F. Supp. 494 (S.D. Idaho, 1966).

This long line of decisions adhering to the exhaustion concept formulated by Fay, supra, has been followed by the Federal District Courts in the second circuit. The court in U.S. ex rel Farrugia v. Bhono, 256 F. Supp. 391 (S.D.N.Y. 1966), held that a New York defendant who had raised contention on a pre-trial motion, at trial, and on appeal in state courts until denied of leave to appeal to Court of Appeals, exhausted state remedies, for federal habeas corpus purposes, although he had not applied to federal Supreme Court for certiorari. A state court prisoner applying for federal habeas corpus is not required first to petition for

certiorari, but he is required to seek relief from all appropriate state tribunals. U.S. ex rel. Johnson v. Warden of Rikers Island Penitentiary, 240 F. Supp. 486 (S.D.N.Y. 1965).

In U.S. ex rel Wallen v. Warden of Greenhaven State Prison, at Stormville, New York, 258 F. Supp. 1012 (S.D.N.Y. 1966), the court stated that a petition for certiorari was not necessary to the exhaustion of state remedies and, in any event, the argument that relator had failed to exhaust remedies was moot where time to petition United States Supreme Court for certiorari had run. This holding is equally applicable to the case at bar. Not only is the petitioner's failure to appeal to the Supreme Court, not a bar to his petition for habeas corpus relief, but the argument is moot since petitioner's time to appeal his conviction to the United States Supreme Court has long expired. The requirement that one exhaust all state remedies refers only to state remedies still open to the applicant at the time he filed his application for habeas corpus in the federal court. Fay, supra at p.434-35.

It is imperative that one read the decision in Fay, supra, to gain the full understanding of the scope and importance of the habeas corpus proceeding. The facts in Fay were as follows:

In 1942, respondent and two co-defendants were

convicted in a New York State Court of murder committed during a robbery, and each was sentenced to life imprisonment. The sole evidence against each was his confession. Respondent did not appeal; but his co-defendants did. Their appeals were unsuccessful; but subsequent proceedings resulted in their release on the ground that their confessions were coerced and their convictions violated the Fourteenth Amendment. Thereafter, respondent applied to the State Court for a coram nobis review of his conviction; but this was denied ultimately because of his failure to appeal. He then applied to a Federal District Court for a writ of habeas corpus, which was denied on the ground that his failure to appeal was a failure to exhaust available state remedies, within the meaning of 28 U.S.C. Section 2254, although it was conceded that respondent's confession had been coerced. The Court of Appeals reversed.

The Supreme Court affirmed on other grounds. They held that the respondent's failure to appeal was not a failure to exhaust "the remedies available in the courts of the State", as required by 28 U.S.C. Section 2254. That requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court.

The court in Fay, supra, went out to discuss

the history and function of the writ of habeas corpus.

"Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Fay, supra at p.401-402.

The doctrine of exhaustion developed as an accomodation to federalism. It would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation....Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with current powers, and already cognizant of the litigation,

have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204. The rule of exhaustion "is not one defining power but one which relates to the appropriate exercise of power." Bowen v. Johnston, 306 U.S. 19, 27. Cf. Stack v. Boyle, 342 U.S. 1; Frisbie v. Collins, 342 U.S. 519; Douglas v. Green, 363 U.S. 192. Fay, supra at p.420. Moreover, the doctrine of comity does not play such an important role in the case at bar. The petitioner has complied with all the state procedural requirements. Every available appellate body of review in the State of New York has had an opportunity to pass on the merits of petitioner's constitutional claim. There can be no argument that petitioner is trying to usurp the state's function by seeking federal review.

The requirement that the habeas petitioner exhaust state court remedies available to him when he applies for federal habeas corpus relief gives state courts the opportunity to pass upon and correct errors of federal law in the state prisoner's conviction. Fay, supra at p.438. The New York State courts have been afforded ample opportunity for review.

Respondent has not been able to cite a single case standing for the discredited proposition in Darr, supra, that an application for habeas corpus in the federal courts will be entertained only after state remedies available, including all appellate remedies

in the state court and in the United States Supreme Court by appeal or writ of certiorari, have been exhausted. Instead, respondent has relied on the recent Supreme Court decision in Wainwright v. Sykes, ____ U.S. ____, 45 U.S.L.W. 4807 (U.S. June 23, 1977), and tried to twist that decision to fit the case at bar.

Firstly, the Wainwright decision should not be applied to the case at hand for Wainwright was decided on June 23, 1977, and petitioner brought his habeas corpus petition on April 19, 1976, more than one year before Wainwright was decided.

Secondly, even if Wainwright were applied retroactively, it does not speak to the issue involved in this case, namely, whether a habeas corpus petitioner must seek United States Supreme Court review of his state conviction before bringing his federal habeas corpus action.

Wainwright involved the following factual situation. During respondent's trial for murder inculpatory statements made by him to police officers were admitted into evidence. No challenge was made on the ground that respondent had not understood the warnings read to him pursuant to Miranda v. Arizona, 384 U.S. 436; nor did the trial judge sua sponte question their admissibility. Respondent, who was convicted, did not challenge

the admissibility of the statements on appeal, though later he did so, unavailingly in a motion to vacate the conviction in state habeas corpus petitions. He then brought a federal habeas corpus action under 28 U.S.C. 2254, asserting the inadmissibility of his statements by reason of his lack of understanding of the Miranda warnings. The District Court ruled that under Jackson v. Denno, 378 U.S. 368, respondent had a right to a hearing in the state court on the voluntariness of the statements, and that he had not lost that right by failing to assert his claim at trial or on appeal. The Court of Appeals agreed that respondent was entitled to a Denno hearing and ruled that the respondent's failure to comply with Florida's procedural "contemporaneous objection rule" (which except as specified, requires a defendant to make a motion to suppress evidence prior to trial) would not bar review of the suppression claim unless the right to object was deliberately bypassed for tactical reasons.

The United States Supreme Court held that respondent's failure to make timely objection under the Florida contemporaneous objection rule to the admission of his inculpatory statements, absent a showing of cause for the noncompliance and some showing of actual prejudice bars federal habeas corpus review of his Miranda claim.

Wainwright went on to say the following:

"It has been the rule that the federal habeas corpus petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state court proceeding. The rule is not changed by the holding today. We deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure."

Wainwright by its own specific language is limited to a situation which is not present in the case at bar. In petitioner's case, his federal law contentions were resolved on the merits in the state court proceeding, and petitioner complied with all requirements of state procedure.

Although the court in Wainwright, supra, rejected some of the language set forth in Fay, supra, it clearly did not address itself to the issue of seeking Supreme Court review before proceeding with a federal habeas corpus action. The Wainwright court was concerned with the issue of an adequate and independent state ground barring the consideration of federal habeas corpus actions, and

not with the question of exhaustion.

Wainwright, supra, rejected some of the language set forth in Fay, supra, only as it related to the State's timely objection rule. It held that the sweeping language set forth in Fay v. Noia which would render a State's timely objection rule ineffective to bar review of underlying federal habeas corpus proceedings absent a "knowing waiver" or a "deliberate bypass" of the right to so object is rejected as according too little respect to the state contemporaneous objection rule. It gave as reasons for its decision the fact that the timely objection rule enables the record to be made with respect to a constitutional claim when witnesses recollections are freshest; enables the trial judge who observed the demeanor of witnesses to make the factual determinations necessary for properly deciding the federal question; and may, by forcing a trial court decision on the merits of federal constitutional contentions, contribute to the finality of criminal litigation.

Clearly, the Wainwright decision is limited to the facts of the case. The major thrust of the decision was the deference a federal court should show when an adequate and independent state ground exists for a state court decision.

Further evidence can be found in the decision

that shows that Wainwright was not concerned with the issue of exhaustion, the issue which is at controversy in the present case. The court discussed that where the habeas petitioner challenges a final judgment of conviction rendered by a state court, this Court has been called upon to decide fewer than four different questions, all to a degree unrelated with one another; (1) What types of federal claims may a federal habeas court properly consider. (2) Where a federal claim is cognizable by a federal habeas court, to what extent must that court defer to a resolution of the claim in prior state proceedings. (3) To what extent must the petitioner who seeks federal habeas exhaust state remedies before resorting to federal court. (4) In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review.

The Wainwright court devotes one scant paragraph to the question of exhaustion, as a matter of the history of habeas corpus and it has no bearing on the court decision. Moreover, the court cites Fay in this paragraph. Then the court states that there is no need to consider here in greater detail these first three areas of controversy attendant to federal habeas review of state convictions. Only the fourth area - the adequacy of state grounds to bar review - is presented in this case. Therefore, Wainwright is totally inapplicable to the case at bar.

The petitioner has fully exhausted his state remedies, his right to appeal to the United States Supreme Court is no longer viable, and therefore the district court properly exercised its discretion in hearing petitioner's application for habeas corpus.

C O N C L U S I O N :

The order denying petitioner-appellant a writ of habeas corpus should be reversed.

Respectfully submitted,

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